United States Department of Labor
Employees' Compensation Appeals Board

C.N., Appellant	)	
and	)	**Docket No. 17-1321**
	)	**Issued: January 16, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Bellmawr, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 31, 2017 appellant, through counsel, filed a timely appeal from a January 20, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish a recurrence of disability commencing November 5, 2015 due to her accepted employment injuries.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

On appeal counsel contends that OWCP should have expanded acceptance of the claim to include disc herniation and cervical and lumbar radiculopathies.

FACTUAL HISTORY

On December 15, 2011 appellant, then a 44-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2011 she was injured in a motor vehicle accident when her car was struck by another car while she was on the shoulder of the road delivering mail. She reported constant lower back issues. Appellant stopped work on the date of injury. OWCP accepted the claim for lumbar muscle strain and cervical strain and paid compensation benefits on the supplemental roll. Appellant returned to part-time, limited-duty work, four hours per day, on March 2, 2012. Her hours increased to five effective April 27, 2012 and ultimately to full-time, full-duty work.

On December 7, 2015 appellant filed a claim for wage-loss compensation (Form CA-7) commencing November 5, 2015. The employing establishment indicated that she was performing full-time, full-duty work when she stopped work on November 5, 2015.

By development letter dated December 15, 2015, OWCP advised appellant that, as she had returned to full-duty work, it appeared that she was "claiming disability due to a material change/worsening of [her] accepted work[-]related conditions." It then requested that she file a claim for recurrence of disability and apprised her of the evidence needed to establish her claim. OWCP afforded appellant 30 days to submit additional evidence and respond to its questionnaire.

On January 8, 2016 appellant filed a notice of recurrence (Form CA-2a) commencing November 25, 2014. She noted that she stopped working on November 4, 2015 and her pay stopped on November 5, 2015. Appellant indicated that the recurrence occurred in October 2014 when she hit potholes while driving her mail truck, but she thought she could work through it. She did not submit any additional evidence.

By decision dated January 19, 2016, OWCP denied appellant's recurrence claim. It noted that she did not respond to its December 15, 2015 development letter.

On January 29, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative, which was held on May 17, 2016.

Appellant, on February 12, 2016, responded to OWCP's questionnaire. She indicated that the roads on her route were full of potholes and bumps. Appellant described the left-sided symptoms she had experienced since her return to work. She indicated that she had not stopped going to her physician since the original incident.

Appellant submitted a November 4, 2015 letter from Dr. Luis A. Cervantes, an attending Board-certified neurologist. Dr. Cervantes noted that he was scheduled to perform surgery on her cervical herniated disc on November 24, 2015. He advised that appellant would be disabled from work as of November 5, 2015 due to her cervical spine problems. Dr. Cervantes, in a February 17, 2016 report, indicated that she continued to have cervical and lumbosacral pain and that her cervical pain had worsened. He noted that his request for authorization to perform

surgery had twice been denied. Dr. Cervantes reported examination findings and indicated that appellant had signs of myelopathy. He advised that she needed her spinal cord depressed anteriorly.

On February 24, 2016 appellant filed another Form CA-2a alleging a recurrence of disability commencing February 19, 2016. She indicated that she stopped work on November 4, 2015 due to neck surgery.

By letter dated April 29, 2016, OWCP advised appellant of the deficiencies in her recurrence claim and afforded her 30 days to submit additional evidence and respond to its questionnaire.

On May 2, 2016 OWCP received an April 25, 2016 lumbar magnetic resonance imaging (MRI) scan report from Dr. Joseph E. Slawek, a Board-certified radiologist, in which he provided an impression of an essentially normal lumbar spine with mild lower lumbar degenerative facet change, stable. It also received daily notes from appellant's physical therapists which addressed her treatment from March 9 to May 16, 2016.

By decision dated June 6, 2016, OWCP denied appellant's February 24, 2016 recurrence claim because the medical evidence of record failed to establish that she was disabled due to a material change/worsening of her accepted work-related conditions.

In prescription notes dated March 3 and 31 and May 2, 2016, Dr. Cervantes ordered physical therapy three times a week for six weeks to treat appellant's lumbar and cervical spine conditions. OWCP received an additional progress note from her physical therapist which addressed her treatment on May 23, 2016.

On June 14, 2016 counsel requested an oral hearing regarding the June 6, 2016 decision. He submitted additional progress notes from appellant's physical therapist regarding her treatment from March 11 to June 20, 2016.

Dr. Cervantes, in a June 7, 2016 letter, noted a history of the December 13, 2011 employment injury and appellant's medical treatment, including his own treatment. He indicated that she continued to work following her injury until November 5, 2016. Dr. Cervantes related that he advised appellant to stop working due to her cervical herniated disc condition for which she underwent an unauthorized anterior cervical discectomy and arthroplasty. He related that she had done very well since the surgery, although she still had minor signs of cervical cord compression that would last a lifetime. Dr. Cervantes indicated that appellant had returned to work.

By decision dated July 28, 2016, an OWCP hearing representative affirmed the January 19, 2016 decision. He found that the medical evidence of record did not contain a rationalized opinion to establish a causal relationship between appellant's current cervical and lumbar spine conditions and the December 13, 2011 employment injuries.

OWCP received reports dated December 12, 2014 and February 23, 2015 in which Dr. Young J. Lee, a physician Board-certified in anesthesiology and pain medicine, noted appellant's complaints of headaches and pain in her neck, thoracic spine, and lower back.

Dr. Lee provided a review of systems, discussed findings on physical examination, and reviewed diagnostic test results. He assessed cervical disc herniation at C4-5 and C5-6, cervical radiculopathy at bilateral C5-6, disc bulging at L5-S1, lumbar radiculopathy at left L5, myofascial pain syndrome, and muscle spasm. Dr. Lee advised that the diagnosed conditions were causally related to the December 13, 2011 employment injuries. In reports dated December 12, 2014 and March 18, 2015, he noted that appellant received an epidural steroid injection at C6-7. Dr. Lee indicated a diagnosis of cervical herniated nucleus pulposus with radiculopathy. On May 13, 2015 he noted that appellant received a medical branch nerve block for cervical facet joints of bilateral C4-5 and C5-6. Dr. Lee provided diagnoses of cervicalgia and cervical facet syndrome.

Dr. Cervantes, in a February 11, 2015 report, noted findings and a diagnosis of ruptured C5-6 herniated disc with myelopathy that required surgery. He maintained that the diagnosed condition was secondary to the accepted injury. In facsimile (fax) transmittals dated November 10, 2015 to April 5, 2016 and in an undated fax transmittal, Dr. Cervantes noted that his surgery request had been denied. He maintained that the requested surgery was work related. In an operative report and a discharge summary dated February 19, 2016, Dr. Cervantes indicated that he performed a C5-6 anterior cervical discectomy with decompression of the cervical spinal canal with bilateral C5-6 foraminotomies with C5-6 arthroplasty with Bryan disc. He reiterated his diagnosis of C5-6 herniated disc with myelopathy. In a letter dated March 3, 2016, Dr. Cervantes noted that, following her February 19, 2016 surgery, appellant continued to have complaints of numbness in her hands and feet. He indicated that all of her injuries were directly related to her work-related accident. Dr. Cervantes examined appellant and again reported that she still had lumbosacral spine problems. He noted that he had no imaging of her lumbosacral spine to determine whether she in fact had pathology in that area, secondary to her work accident.

In a September 2, 2015 report, Dr. Uplekh Purewal, Board-certified in anesthesiology and pain medicine, noted appellant's complaints of headaches and pain in neck, thoracic spine, and lower back. He provided a review of systems and findings on physical examination and reviewed diagnostic test results. Dr. Purewal assessed cervical disc herniation at C4-5 and C5-6, cervical radiculopathy at bilateral C5-6, disc bulging at L5-S1, lumbar radiculopathy at left L5, myofascial pain syndrome, and muscle spasm. In another report dated September 2, 2015, he indicated that appellant received two trigger point injections. Dr. Purewal provided a diagnosis of myofascial pain syndrome and cervicalgia.

In a June 17, 2015 report, Dr. Russell I. Abrams, a neurologist, performed an electromyogram (EMG) study which was abnormal due to a proximal nerve lesion on the right and left sides at the C5-6 levels.

By decision dated August 15, 2016, an OWCP hearing representative denied appellant's June 14, 2016 request for an oral hearing regarding the June 6, 2016 decision. She found that, on February 24, 2016, appellant had filed a duplicate claim for a recurrence of disability commencing November 5, 2015. The hearing representative found that since appellant had already received a hearing on her claim for recurrence of disability beginning November 5, 2015, she was not, as a matter of right, entitled to another review by OWCP's Branch of Hearings and Review on the same issue. She exercised her discretion in further denying appellant's request for

a hearing, finding that the issues could equally well be addressed by requesting reconsideration and submitting supportive evidence.

On August 23, 2016 appellant, through counsel, requested reconsideration of the July 28, 2016 decision.

OWCP, in a January 20, 2017 decision, denied modification of its July 28, 2016 decision.

LEGAL PRECEDENT

OWCP's implementing regulations define a recurrence of disability as "an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which has resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness."[3]

When an employee claims a recurrence of disability due to an accepted employment-related injury, he or she has the burden of proof to establish by the weight of the reliable, probative, and substantial evidence that the recurrence of disability is causally related to the original injury. This burden includes the necessity of furnishing evidence from a qualified physician, who on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.[4]

ANALYSIS

OWCP accepted that appellant sustained work-related lumbar and cervical strains in the performance of duty on December 13, 2011. Appellant initially returned to part-time, limited-duty work following her work injuries and subsequently returned to full-time regular-duty work. She stopped work on November 5, 2015. Appellant claimed compensation for a recurrence of total disability commencing on November 5, 2015.

The Board finds that appellant failed to submit sufficient medical evidence to establish a recurrence of total disability on or after November 5, 2015 due to her accepted work injuries.

Appellant submitted a series of reports from Dr. Cervantes dated February 11, 2015 to June 7, 2016. In the February 11, 2015 report, Dr. Cervantes examined her and diagnosed a ruptured C5-6 herniated disc with myelopathy for which she required surgery. He opined that the diagnosed condition was secondary to the accepted December 13, 2011 employment injuries. However, OWCP has not accepted a herniated disc as an employment-related condition.[5] In

[3] 20 C.F.R. § 10.5(y); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2.a (June 2013). *See also Philip L. Barnes*, 55 ECAB 426 (2004).

[4] *Ricky S. Storms*, 52 ECAB 349 (2001); *Helen Holt*, 50 ECAB 279 (1999).

[5] *See G.A.*, Docket No. 09-2153 (issued June 10, 2010) (for conditions not accepted as employment related by OWCP, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship).

faxes dated November 10, 2015 to April 5, 2016, Dr. Cervantes noted that the proposed surgery was work related. However, his opinions on causal relationship are of limited probative value as he did not provide any medical rationale in support of his conclusions. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.[6] While Dr. Cervantes opined in his March 3, 2016 report that, all of appellant's injuries were directly related to the accepted employment injuries, he indicated that further diagnostic testing was necessary to determine whether she had any pathology in the lumbar region secondary to the accepted injuries. The Board finds that his report is equivocal and speculative as to a causal relationship between her lumbar condition and the accepted employment injuries. The Board has held that speculative and equivocal medical opinions regarding causal relationship have little probative value.[7] Dr. Cervantes other reports addressed appellant's cervical conditions and her unauthorized surgery performed on February 19, 2016, but did not offer a medical opinion addressing whether the diagnosed conditions and any resultant disability as of November 5, 2015 were causally related to he accepted lumbar and cervical sprains. The Board has found that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[8] For these reasons, Dr. Cervantes' reports are insufficient to establish appellant's recurrence of disability claim.

Further, Dr. Lee's December 12, 2014 and February 23, 2015 reports are also of diminished probative value on the issue of causal relationship. In his reports dated December 12, 2014 and February 23, 2015, he discussed examination findings and noted that appellant had cervical disc herniation at C4-5 and C5-6, cervical radiculopathy at bilateral C5-6, disc bulging at L5-S1, lumbar radiculopathy at left L5, myofascial pain syndrome, and muscle spasm. Dr. Lee opined that the diagnosed conditions were causally related to the accepted December 13, 2011 employment injuries. His opinion on causal relationship is of limited probative value as he did not provide medical rationale explaining how or why appellant's conditions were employment related.[9] As the Board has held, where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[10] Dr. Lee's remaining reports addressed her cervical conditions and treatment, but did not offer any medical opinion finding that the diagnosed conditions and any resultant disability commencing November 5, 2015 were causally related to he accepted work injuries.[11] Thus, the Board finds that his reports are insufficient to establish appellant's burden of proof.

[6] *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

[7] *Ricky S. Storms*, 52 ECAB 349 (2001) (while the opinion of a physician supporting causal relationship need not be one of absolute medical certainty, the opinion must not be speculative or equivocal. The opinion should be expressed in terms of a reasonable degree of medical certainty).

[8] *See R.B.*, Docket No. 17-0556 (issued June 2, 2017); *J.D.*, Docket No. 16-0887 (issued November 4, 2016); *L.M.*, Docket No. 16-0143 (issued February 19, 2016).

[9] *Supra* note 6.

[10] *See M.S.*, Docket No. 17-0105 (issued December 7, 2017); *Jaja K. Asaramo*, Docket No. 55 ECAB 200 (2004).

[11] *Supra* note 8.

The remaining medical evidence of record is also insufficient to establish a causal relationship between appellant's injury and the claimed disability. Dr. Purewal's September 2, 2015 reports and Dr. Slawek's April 25, 2016 MRI scan report addressed her cervical and lumbar conditions, but did not offer a medical opinion on the causal relationship between the diagnosed conditions and any resultant disability and the December 13, 2011 work injuries.[12] Dr. Abrams' June 17, 2015 EMG report failed to provide a firm diagnosis of a particular medical condition,[13] or a specific opinion on how the accepted conditions would cause or contribute to appellant's disability as of November 5, 2015.[14] The Board finds, therefore, that these reports of are of limited probative value.

The records from appellant's physical therapists have no probative value as a physical therapist is not considered a physician under FECA.[15]

On appeal counsel contends that OWCP should have expanded acceptance of the claim to include disc herniation and cervical and lumbar radiculopathies. However, as discussed above, the medical evidence of record does not support that the December 13, 2011 employment injury caused disc herniation and cervical and lumbar radiculopathies.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has failed to meet her burden of proof to establish a recurrence of disability commencing November 5, 2015 due to her accepted employment injuries.

[12] *Id.*

[13] *See Deborah L. Beatty*, 54 ECAB 340 (2003) (where the Board found that, in the absence of a medical report providing a diagnosed condition and a reasoned opinion on causal relationship with the employment incident, appellant did not meet her burden of proof).

[14] *Supra* note 8.

[15] The term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); *J.G.*, Docket No. 15-0251 (issued April 13, 2015); *A.C.*, Docket No. 08-1453 (issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation, as physical therapists are not considered physicians as defined under FECA).

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 16, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board